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No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Where post-deprivation procedures for return of property are held to be adequate to meet due process requirements, may the court require more?

2. Are police officers and other municipal officials qualified and able to give the type of notice required by the Ninth Circuit in *Perkins v. City of West Covina*, 113 F.3d 1004 (1997)?

3. Did the Ninth Circuit correctly apply *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), to the facts of this case?

4. Does the Ninth Circuit's notice requirement have an adverse impact on municipal liability?

Motion of *Amici Curiae* For Leave To File Brief on the Merits in Support of Petitioners

Pursuant to Supreme Court Rule 37.2, sixty-two cities, counties and towns within the State of California respectfully move for leave to file the accompanying *amicus curiae* brief in support of the petition in this case. These cities, counties and towns are listed in the Appendix to this brief. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF THE *AMICI CURIAE*

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in Perkins will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally seized property, to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up

conflicting duties and obligations for local governmental employees.

July 16, 1998

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER CITY OF WEST COVINA[1]

SUMMARY OF ARGUMENT

This brief is submitted on behalf of sixty-two cities, counties and towns within the State of California as amici curiae in support of the Petitioner City of West Covina to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9), which is set forth as Appendix A to Petitioner's Appeal Brief (the "Pet. App.") filed by Petitioner in this action.

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in *Perkins* will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally seized property to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up conflicting duties and obligations for local governmental employees.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Amici urge the Court to reverse the determination of the Court of Appeal.

ARGUMENT

I. The *Perkins* court acknowledges that California post-deprivation procedures satisfy due process requirements for return of property, but then inexplicably demands more.

The Supreme Court has held that due process of law requires that an individual deprived of property under color of law be given notice and an opportunity to be heard before such deprivation becomes permanent. *Matthews v. Eldridge*, 424 U.S. 319 (1976). According to the Court in *Matthews*, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333. However, due process "is not a fixed set of rights, it 'is flexible and calls for such procedural protections as the particular situation demands.' " *Anderson v. Nelson*, 352 F.Supp. 1124, 1128 (1972) (D.C.N.D. CA). Thus, the type of notice required by procedural due process varies according to the facts of each case.

The Supreme Court has established a constitutional minimum for sufficient notice. Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949). Additionally, "[t]he notice must be of such

nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." *Id.* Moreover, "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the grounds that it is in itself reasonably certain to inform those affected." *Id.* at 315. Thus, constitutionally sufficient notice does not require that an individual be informed of his legal recourse in a particular situation, but merely that he be informed that an action is pending against him in a manner that allows him to defend against the action.

In *Perkins*, the Ninth Circuit Court of Appeal acknowledged the adequacy of California law relating to post-deprivation procedures for return of property. The court stated as follows:

> "Perkins thus had available to him post-deprivation procedure for the return of his property – a 'nonstatutory' motion under § 1536 and a § 1540 motion. We agree with the California Supreme Court that '[t]hese various remedies satisfy the requirements of due process. [citation omitted]. . . .
>
> Due process notice 'must be of such nature as reasonably to convey the required information.' *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The 'notice' left at Perkins' home simply informed him that his home had been searched by the West Covina police department, with the date of the search warrant and the issuing judge and court, the date of the search, a list of the property seized, and the names and telephone numbers of several officers of the police department to contact for 'more information.' The issue is whether due

> process required more: that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy." Pet. App. A-17-19.

The question is indeed "whether due process requires more" than notice of the existence of a process acknowledged by the reviewing court to be adequate. Amici contend that it does not.

The Ninth Circuit Court of Appeals has consistently expanded and embellished the requirements imposed on local government with regard to notice in recent years, apparently on the theory that "more" is always required. For example, in *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994), a case cited by the court in *Perkins*, the Ninth Circuit ruled that even though notice was properly given in advance of an administrative hearing regarding zoning violations and state vehicle code nuisance abatement procedures, "more" was needed. In that case, a landowner was storing a large number of cars, most in inoperable condition on agriculturally zoned property.

The County gave notice of abatement, including notice that inoperable vehicles would be destroyed, pursuant to County codes and the provisions of the California Vehicle Code § 22660. An administrative hearing was held based on that notice at which the landowner did not contest the issue of whether the vehicles themselves constituted a nuisance under the vehicle code. The hearing officer ruled against the landowner and in favor of the County of San Diego on the zoning issue, but made no finding on the uncontested vehicle nuisance abatement issue. The court ruled that "more" notice was required

before the County could legally destroy the seized vehicles.

The reasoning of the court creates a presumption in favor of the property owner that carries through the administrative proceeding and then requires "more" notice: The court said,

> "The County did not violate Schneider's due process rights when it abated the nuisance on his property by removing the vehicles. However, the record does not show that the vehicles themselves were nuisances. The hearing officer affirmed the nuisance finding pursuant to Regulatory Code § 16.-210, on the theory that Schneider's vehicles were parked in violation of county zoning ordinances. This action was binding on the County and Reybro as well as Schneider. Once the vehicles were removed from the property the nuisance abatement was complete and the County was only authorized "to otherwise proceed pursuant to sections 16.-212 through 16.-217 of the San Diego Code of Regulatory Ordinances." These sections do not authorize the destruction of vehicles; they provide a procedure for recovering the cost of the abatement proceedings.

The County and Reybro argue that because the posted NOTICE AND ORDER TO ABATE informed Schneider that he was in violation of County Code § 78.101, he was on notice that his vehicles could be disposed of pursuant to section 78.114, "by removal to a scrap yard or licensed automobile dismantler's yard." However, San Diego County Code §§ 78.101 through 78.118 and their authorizing statute, California Vehicle Code § 22660, apply only to vehicles

declared to be public nuisances because they are "abandoned, wrecked, dismantled, or inoperative. [Citations omitted.]

We hold that following the hearing officer's order the County was obligated to proceed on the theory that Schneider's vehicles were nuisances only because they were parked in violation of county zoning ordinances. Therefore, County Code § 78.114 was not applicable to Schneider's vehicles and the citation of County Code § 78.114 in the NOTICE AND ORDER TO ABATE did not provide Schneider the notice required by due process." [Citations omitted] 28 F.3d 89 at 93.

Thus, even though proper and adequate notice was given in advance of the administrative hearing that the vehicles could be destroyed, the silence of the hearing officer on the uncontested issue of the inoperable condition of the vehicles was sufficient in the mind of the court to require "more" notice and to prevent the County from carrying out the complete abatement remedy that had already been noticed.

Due process here, as in *Perkins*, required "more" according to the Ninth Circuit Court of Appeals in what appears to be a consistent, and *Amici* would argue inappropriate expansion of procedural due process requirements that make it virtually impossible for local government to ever get it right.[2] This expansionist philosophy is evident in *Perkins* and is contrary to sound constitutional principles of law.

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[2] Interestingly, this case was heard by a jury on remand and the jury found in favor of the County. The landowner appealed and the Ninth Circuit reversed the jury verdict in an unpublished opinion. The County's petition for rehearing and rehearing En Banc is pending at the present time according to the office of the San Diego County Counsel. (*See*, Letter from County Counsel dated July 8, 1998, attached hereto as Appendix A).

A. The notice required by the court in *Perkins* goes well beyond established standards for notice of constitutionally protected rights.

The Ninth Circuit has unduly expanded the concept of constitutionally sufficient notice in *Perkins* by requiring that police officers give legal advice to the very individuals against whom such police officers act to seize property in connection with criminal investigations. The Court of Appeal stated that constitutionally adequate notice,

> " . . . must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned." (Pet. App. A-22)

Much of this notice requirement appears to be reasonable, is currently the standard procedure followed by California cities, and in fact was complied with in *Perkins*. The language requiring information about the need for a written motion or request to the court, however, requires local governments to go beyond giving notice. It requires

them to provide legal "advice and guidance." Court procedures and requirements change and vary according to local rules. A requirement for written motion may be required in one jurisdiction and not in another. To meet the notice requirement in *Perkins*, public entities must be continually updated and apprised of such procedures and must take responsibility for adjusting the notice given as changes in court mandated procedures occur. Ordinarily, the responsibility for determining how to proceed rests with the individual and his or her legal advisor, not with local governmental officials.

Essentially, the question is whether the individual assumes responsibility for finding out what procedural rules apply, or whether governmental entities that do not set such rules must act *in parens patriae*. Historically, the court has rejected the notion that government must take on such paternal responsibilities. Justice Stevens argued against exactly this type of detailed notice in his dissent in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). He stated that a more detailed notice requirement "rests on a paternalistic predicate that I cannot accept." *Id.* at 26.

The facts of the *Perkins* case demonstrate the folly of attempting to make local government responsible for the proper assertion of individual rights. According to the California district court, "Perkins was told he needed a court order. He was told which court and judge to go to. It is not unreasonable to require him to submit some kind of written request in an attempt to test the adequacy of the procedure." (Pet. App. E-7) Additionally, the court found that Perkins did not make a concerted effort to get his property returned.

The court stated that he, " . . . made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . "(Pet. App. E-7). Thus, Perkins' deprivation of property did not arise because of constitutionally inadequate notice but because of his failure to initiate the judicial remedy available to him. Constitutionally adequate notice in this case does not require the detailing of legal procedure nor advice on how to initiate this procedure. The failure on the part of the plaintiff to make the effort to properly assert his rights simply does not justify placing a constitutional burden on local government and police departments to provide legal advice to individuals whose property has been seized pursuant to a search warrant.

B. The *Perkins* notice requirement imposes an unwarranted duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy.

The primary flaw in the reasoning of the court in *Perkins* is the assumption that reasonable notice requires public officials to explain judicial procedures to those seeking to obtain return of property legally seized in the course of police investigations. Explanation of such procedures, which are established by the courts and not by municipalities, counties or towns, puts local officials in the position of rendering legal advice to individuals who are inherently adverse to the governmental entity served by such officials.

Further, not only are untrained public employees required to give legal advice that could constitute the unauthorized practice of law, such employees are required to give advice that may be directly in conflict with the interests of the public entity which they are sworn to serve. The purported "notice" required by the court in *Perkins* goes far beyond standard notice requirements, and if allowed to stand, will place public employees in an untenable position.

1. Municipal officials are generally prohibited from giving legal advice because, in the usual case, they are not qualified to do so.

Municipal officials who are non-lawyers are prohibited from giving the legal advice required by *Perkins*. According to California Business and Professions Code section 6126(a) (Deering 1997), any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor. The definition of the practice of law includes the giving of legal advice. For instance, in *People v. Merchants Protective Corp.*, 189 Cal. 531 (1922), the California Supreme Court held that a corporation comprised of non-lawyers could not, as its business, provide legal services to its members. These legal services included the giving of legal advice. According to the Court, " . . . under the laws of California, individuals may not, either singly or in association, engage in the practice of law without having a special license to do so." *Id.* at 533. Since *Perkins* requires municipal officials who are not lawyers to

engage in the practice of law, it also requires that these officials violate the law.

2. Police Officers are not usually licensed attorneys or otherwise qualified to give legal advice.

Not only are municipal officials prohibited from giving legal advice, most are unqualified to do so. For instance, police officers are not qualified to give legal advice. To become a police officer in California, an individual is not required to either be an attorney or have any legal education or training. California law specifies only minimal eligibility requirements for police officers. To become a police officer in California, an individual must: (1) be a citizen of the United States who is at least 18 years of age and of good moral character (CAL. GOV'T CODE § 1031 (Deering 1997)), (2) disclose any past criminal record he may have, (3) must be free of any physical, mental, or emotional condition which might adversely affect his exercise of the powers of a peace officer, and (4) have the equivalent of a high school diploma. Police officers are not required to be licensed attorneys and very few of them are.[3] Thus, the giving of legal advice is beyond the expertise of police officers.

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[3] The *Perkins* decision also poses problems in the unusual situation where a police officer happens also the be a licensed attorney. Two sections of the California Government Code apply to peace officers who are also attorneys at the county level. One section of the code states that sheriffs, clerks, constables, or any of their deputies shall not practice law (CAL. GOV'T CODE § 24004). An exception to this rule exists for deputy sheriffs. A deputy sheriff may practice law if he gives legal advice to his employer that is within the course and scope of his employment

Even if all police officers were licensed attorneys, however, they would be prohibited from giving legal advice to the very individuals whose property they legally seize. By providing the advice and legal guidance required by *Perkins*, police officers would be legally assisting the same individuals they are collecting evidence against. Thus, the *Perkins* notice requirement creates an irreconcilable conflict of interest for police officers who are hired to serve a municipality but required to give legal advice to individuals to be used against their employer.

The ruling in *Perkins* contrasts dramatically with the care taken by the Supreme Court in crafting notice requirements in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). There, the Court carefully defined the contours of an individual's Fifth Amendment right not to incriminate himself when he is in police custody and

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or if he represents an individual in civil matters with which the deputy sheriff does not have or will not have any association (CAL. GOV'T CODE § 24004.5).

If peace officers at the county level who are also attorneys are required to give legal advice to individuals whose property has been seized they will violate the California Government Code. Although deputy sheriffs may give legal advice in limited instances, they may not give legal advice to anyone who is not their employer. An individual whose property is seized pursuant to a search warrant is not a deputy sheriff's employer. Additionally, if the deputy sheriff seized the property or performed any act relating to the seizure of the individual's property, he is prohibited from giving legal advice to that individual. Thus, the *Perkins* notice requirement will force peace officers who are also attorneys to choose between violating either California's Government Code or judicially-created law.

required police officers to give only that information necessary to alert the individual to his rights. Specifically, the Court stated that, " . . . [a] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

The Court went on to delineate the entirely different role of an attorney for the accused which may include advising his client not to talk to the police until he has an opportunity to investigate the case, or remaining with his client during police questioning. The Court further stated that this role for the attorney, " . . . is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under oath – protecting to the extent of his ability the rights of his client." *Id.* at 480. The Court's ruling in *Miranda* notes the distinction between the duty of a government official to give notice of fundamental rights and the duty of a licensed attorney to be an advocate for one charged with a crime. The attorney's duty to his client is to advise him of his rights and the possible consequences of his acts and the legal procedures available to him to avoid or minimize those consequences. The duty of a police officer is merely to give notice of the existence of specific fundamental rights and to assure that the government does not exceed its authority with regard to those rights.

Under *Miranda*, police are required only to inform a suspect of his Fifth Amendment rights against self-incrimination. This notice alerts the accused that protection of these rights may require the presence of an attorney. Officers are not required to tell suspects about the

legal remedies they may have, if their Fifth Amendment rights are violated. Nor does this notice require police officers to inform individuals as to how they may initiate proceedings against the police to challenge their actions if a constitutional deprivation occurs. If officers were forced to give suspects this legal guidance in such circumstances, they would be placed in the untenable position of legally assisting the same individuals they are collecting evidence against. The fundamental conflict of interest is patent.

Quite simply, police officers are not unbiased fiduciaries under the law – they are the enforcement arm of local government and when they act to enforce the law, they represent the public interest in an orderly society. When an officer lawfully seizes property subject to a warrant with probable cause that a crime has been committed, he is not impartial in his thinking or his actions. He has been convinced, and has convinced the judge issuing the warrant, that a crime has been committed and that it is necessary for him to act to protect the public. In the exercise of his duties, he must, of course, proceed fairly and equitably under the law to assure that the rights of the accused are protected. But, to require him to advise the very person whose property he has lawfully seized in the course and scope of his duty as a police officer on the legal procedures to challenge his action or to regain the seized property is absurd. The *Perkins* decision confuses the role of the police officer with the role of an attorney and by doing so creates a conflict of interest for these officers.

3. City Attorneys have the skill but not the legal authority to give advice for the benefit of individuals seeking to recover lawfully seized property.

In order to fulfill the *Perkins* notice requirement, it could be argued that municipal officials and police officers should consult with the city attorney and ask the city attorney to provide the required legal advice. In a municipality, the city attorney is the individual who advises city officials on all legal matters pertaining to city business (CAL. GOV'T CODE § 41801 (Deering 1997)). It is therefore not unusual for staff personnel to consult the city attorney to determine whether a particular course of action is legal.

This consultation is inappropriate, however, in cases where a municipal officer or staff member seeks advice from the city attorney to assist an individual who has violated a city ordinance or who is accused of a crime. A city attorney represents the city and may not assist in the defense of an individual who has violated any ordinance of the city he or she represents. This rule applies regardless of whether the city attorney has prosecutorial responsibilities on behalf of the city by which he is employed (CAL. GOV'T CODE § 41805). Additionally, if the city attorney has prosecutorial responsibilities, he may not defend or assist in the defense of persons accused of crimes. *People v. Rhodes*, 12 Cal. 3d 180, 187 (1974). This rule is a judicially-created rule of criminal procedure. *Id.* at 186.

These limits on a city attorney's authority to give legal advice, coupled with the *Perkins* notice requirement,

create a professional conflict of interest for city attorneys. It is axiomatic that most individuals whose property is the subject of a search warrant are criminal suspects. If a criminal suspect's property is seized pursuant to a search warrant and he is not home when the seizure occurs, *Perkins* requires that police officers provide notice of the seizure that contains legal advice and guidance as to the procedures to be followed to regain the property. If this is in written form, prepared by the city attorney, the city attorney has no control over who receives his written advice, but is fully responsible for the accuracy of it. If the advice is provided orally by the city attorney to the police officer on a case-by-case basis, the police officer, who is not an attorney but a third party, essentially waives the attorney-client privilege that would otherwise attach when he passes the advice along.

Further, if a police officer contacts the city attorney to obtain legal advice for a criminal suspect, and if the city attorney has prosecutorial responsibilities, the city attorney will violate a rule of criminal procedure if he provides this advice. If the city attorney refuses to provide this legal advice, he puts the police officer, an individual with no formal legal training, in the position of having to provide this advice or incur municipal liability.

4. City clerks frequently deal with the law, but are prohibited from giving legal advice.

In a municipality, many roles assumed by public employees involve dealing with the public in areas where legal issues arise. Because governmental officials are not trained legal advisors, statutory provisions have been

enacted strictly limiting public employees with regard to providing the public with legal advice as to how to proceed in various matters. City clerks, for example, are required to give information with regard to a wide variety of matters that involve legal consequences for individuals. For instance, election rules have serious consequences for individuals seeking public office. Nevertheless, it is well established that where any question arises as to legal procedures, city clerks decline to advise individuals on such matters because to do so would be to give legal advice, rather than just public notice.

City clerks are generally not qualified to give legal advice and are prohibited from doing so under the provisions of California Business and Professions Code section 6126(a) (Deering 1997). California law does not require that city clerks be attorneys nor have any legal education. Under general California law, city clerks are elected by city electors (CAL. GOV'T CODE § 36503 (Deering 1997)). To be elected as a city clerk, an individual may not be an elector of the city and must have resided in the electing city for the year preceding his election (CAL. GOV'T CODE § 36502). These eligibility requirements do not mandate that a city clerk have any legal education. Additionally, the California Legislature has prescribed the duties of city clerks in the Government Code.[4] The pertinent

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[4] According to the Code, these duties are as follows: 1) City clerks maintain accurate records of the proceedings of the city's legislative body and board of equalization (CAL. GOV'T CODE § 40801); 2) City clerks act as accounting officers of the city and maintain records of the financial codes of the cities (CAL. GOV'T CODE § 40802); 3) City clerks summarize the city's financial report and publish it in a paper of general circulation or post the

sections of this code do not authorize city clerks to give legal advice even though they have duties that pertain to the judicial system and that have immediate legal consequences. City clerks, for example, maintain books with city ordinances and may take and certify affidavits and depositions. As part of their ministerial duties, city clerks determine whether referendum, initiative or recall petitions comply with the law. Based upon a city clerk's application of statutory requirements in such instances, ballot measures, and elected official incumbencies may be submitted to the voters or withheld from them. Despite the legal nature of these ministerial duties, city clerks are not empowered to either interpret or advise individuals as to available procedures or methods for challenging the city clerk's determination. That responsibility rests with the individual. After *Perkins*, in order to avoid municipal liability, city clerks may be placed in the unenviable

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report in public places (CAL. GOV'T CODE § 40803); 4) City clerks keeps a book marked "ordinances" and record in it all city ordinances with his certification annexed to each, stating: (a) It is a true and correct copy of a city ordinance; (b) The ordinance number; and (c) It has been published or posted pursuant to law (CAL. GOV'T CODE § 40806); 5) City clerks are the ex officio assessors unless the legislative body provides for the assessment and collection of city taxes by county officers or otherwise (CAL. GOV'T CODE § 40810); 6) City clerks are custodians of the city seal (CAL. GOV'T CODE § 40811); 7) City clerks may have additional duties as prescribed by statute (CAL. GOV'T CODE § 40812); 8) City clerks may appoint deputies (CAL. GOV'T CODE § 40813); 9) City clerks and their deputies may administer oaths or affirmations and take and certify affidavits and depositions pertaining to city affairs and business which may be used in any court proceeding in the state (CAL. GOV'T CODE § 40814).

position of making ministerial determinations and then advising those affected as to how to challenge those determinations. In doing so, they may be required to go beyond the scope of their statutorily-defined duties and provide advice and guidance as to legal procedures and remedies outside their immediate knowledge and control.

5. Even clerks of the court, who have direct knowledge concerning court rules and proceedings, are prohibited from giving legal advice to individuals.

City clerks are less conversant with judicial procedure than clerks of court. Yet, even clerks of court are prohibited from interpreting judicial procedure or advising individuals how to proceed in a particular matter. Clerks of the court have no legal or judicial authority unless the constitution or legislature provides them with this authority. *See People v. Kuder*, 90 Cal. App. 594 (1928) (where the court stated, "It has uniformly been held that ordinarily the clerk of court is but a ministerial officer and is clothed with no judicial powers." *Id.* at 600). Generally, a clerk of court has no authority to hear evidence, to determine whether a demurrer or answer has been served on an attorney, to construe pleadings or rights thereunder, or to pass on whether an answer to a complaint is defective, irregular, or insufficient to constitute a defense. 12 CAL. JUR. 3D *Clerks of Court* § 1 (1972).

These prohibitions on a clerk's exercise of his or her authority indicate that clerks should not interpret legal procedure. If a clerk of court should not interpret legal procedure, it follows that a city clerk, who has less

knowledge about legal procedure than a clerk of court, should not give legal advice on this procedure. In fact, to assure that there is no confusion on the part of the public in this regard, courts in California routinely post signs at the clerk's station stating that the clerk is prohibited from giving legal advice.

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures.

In *Perkins*, the Ninth Circuit justified its new notice requirement on the basis of *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978). In *Memphis Light*, the Supreme Court required a municipal utility company to provide information to its customers about its own internal dispute resolution procedures. These procedures were essentially created by the municipality since the utility company functioned under the ultimate control of the municipal government.[5] Thus, provision of notice to a customer which "inform[s] the customer not only of the possibility of termination but of a procedure for challenging a disputed bill," *Id.* at 12, does not require that a municipal utility company inform itself of dispute resolution procedures outside of its control or expertise.

[5] In *Memphis Light*, the Court indicated that, "Memphis Light, Gas and Water Division (MLG&W) is a division in the city of Memphis which provides utility service. It is directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government." *Id.* at 1.

Conversely, the Ninth Circuit in *Perkins* used the Court's holding in *Memphis Light* to compel municipal agencies and police departments, to inform individuals about judicial remedies which they do not create and cannot control. Specifically, the Ninth Circuit required that the police provide notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court." (Pet. App. A-22). Unlike the municipal utility company in *Memphis Light*, neither the City of West Covina nor its police department created the judicial procedures available to aggrieved individuals in the *Perkins* case. These procedures are not dispute resolution procedures internal to the police department but judicially established local court procedures. These local-law procedures implement the remedies contained in the California Penal Code which were created by the state legislature, not the municipal government. Thus, no municipality has ultimate control over these procedures or remedies. Thus, the *Perkins* notice requirement goes well beyond Supreme Court's notice requirement in *Memphis Light*.

Not only does the *Perkins* notice requirement expand the concept of constitutionally adequate notice, it also expands it in a manner rejected by the Court in *Memphis Light*. In this case, the plaintiffs could have pursued their remedy either through the municipal utility company or the court system. Although the Court required that the municipal utility company provide information to the plaintiffs on their internal dispute resolution procedures, it did not require that the municipal utility company

provide information to the plaintiffs on judicial procedures or remedies.

The Court mentioned the availability of these judicial remedies, stating, "An aggrieved customer [of a municipal utility company] may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light*, 436 U.S. at 11. The Court did not, however, require the municipal utility company to inform the aggrieved customer as to how it could proceed in court to obtain these legal remedies.

According to Justice Stevens' dissent, the Court wisely avoided requiring that municipal utility companies provide this type of "legal advice" to customers. *Id.* at 26. Thus, *Memphis Light* confirms that municipalities should not be required to give legal advice on judicial remedies. The Ninth Circuit ignored this determination when it asserted that constitutionally adequate notice requires a municipality to provide legal advice and guidance on judicial procedures and remedies.

III. The *Perkins* notice requirement unduly increases municipal liability.

The *Perkins* decision unduly and unjustly increases municipal liability and exposure to claims. Under *Perkins*, police departments will be required to provide legal advice to individuals whose property is seized pursuant to a search warrant in order to avoid liability under 42 U.S.C. § 1983. Civil rights litigants may use the *Perkins* decision as precedent to argue in other factual settings

that police action deprived them of a liberty or property interest and that the police's notice with regard to this deprivation did not contain the adequate legal advice. If police departments do not accurately predict the factual circumstances in which a plaintiff could successfully make this argument, municipalities will face greater liability.

Police departments are not the only public agencies affected by the *Perkins* decision. If this decision is interpreted broadly by the courts, all public agencies are potentially subject to this notice requirement if agency action deprives an individual of a constitutionally protected liberty or property interest. Thus, if these agencies fail to give an affected individual notice with adequate legal advice and guidance, they may be held liable under a 42 U.S.C. § 1983 action.

Where cities control the delivery of utility services, as in *Memphis Light*, the ruling in *Perkins* would now logically expand the notice requirement to include a requirement to give advice and guidance regarding judicial procedures and remedies available after exhaustion of all administrative remedies. Similarly, where any government provided benefit is subject to termination under local procedures designed to assure due process, a public agency could now be required to do more than give notice under its own rules. Thus, where utility tax exemptions are permitted by local ordinances for low and/or moderate income families, notice of the requirements and procedures for judicially challenging any termination of such an exemption under the local ordinance would need to be provided to avoid potential civil rights liability.

The list of circumstances where cities may be obligated to provide legal advice and guidance with regard to court procedures is extensive and prone to further expansion in the courts if the *Perkins* ruling is allowed to stand. Termination of trash hauling services, water and sewer services, home loan assistance programs all could trigger the expanded notice requirements of *Perkins*. Impoundment of vehicles for illegal parking or other violation of law could result in legal challenge based on failure to give adequate legal advice to assure return of the vehicle. Simply knowing when legal advice on judicial procedures and remedies should be given will pose a substantial burden on public agencies and expose them to substantial damages should they guess wrong.

The burden on local governments inherent in the *Perkins* expansion of due process notice requirements is substantial and unwarranted. To repeat the Ninth Circuit Court of Appeal's explicit ruling with regard to the adequacy of existing California requirements, "We agree with the California Supreme Court that [t]hese various remedies satisfy the requirements of due process." (Pet. App. A-17).

CONCLUSION

The ruling of the Ninth Circuit Court of Appeal in *Perkins* is ill-conceived and far too broad in its implications for local government and local police departments. Rather that establishing a simple *Miranda*-like notice requirement, the court has imposed a duty on local government and police officers to provide substantive legal

advice to the very individuals against whom governmental action has been taken. Further, the advice that must be given concerns procedures that are established, implemented and controlled by the courts, not by local governmental entities. Such procedures are subject to change without notice to local government employees or police officers, and simply being certain that the advice given under *Perkins* continues to be correct imposes a substantial burden on local government.

If change in the existing notice requirements is warranted, then it would be prudent to limit that change to a simple statement that any individual deprived of property pursuant to a legitimate search warrant has the right to contact an attorney for assistance in recovering such property. That limitation would be consistent with the requirements established in the *Miranda* case and would not require municipal employees to provide legal advice on court procedures outside their knowledge and control.

Requiring a local governmental agency to give advice and guidance to individuals with regard to court procedures available for the recovery of property poses an undue burden on local government. It further exposes taxpayer funded governmental entities, to unnecessary and unwarranted liability for their actions in attempting to comply with the requirements set forth in *Perkins*.

Accordingly, we respectfully request the Court to reverse the decision of the Court of Appeal.

Respectfully submitted,

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JULIA HAYWARD BIGGS
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APPENDIX A

(SEAL)

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[Names Omitted In Printing]

July 8, 1998

VIA FACSIMILE & U.S. MAIL

Julie Hayward Biggs, Esq.
Burke, Williams & Sorensen, LLP
611 West Sixth Street, Suite 2500
Los Angeles, California 90017

Dear Ms. Biggs:

Re: Amicus support for City of West Covina in West Covina v. Perkins, U.S. Supreme Court No. 97-1230

Your letter dated June 4, 1998, has just come to my attention. I am enclosing t' e County of San Diego's election to join in the amicus brief.

The published opinion in your case cited *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994), *cert.* denied 513 U.S. 1155 (1995), a case which I have been handling. After summary judgment for defendants was reversed, the case was tried to a jury, which rendered a full defense verdict. Recently the Ninth Circuit (in an unpublished

memorandum) reversed that verdict; the County's petition for rehearing and rehearing En Banc is pending at this time.

If you plan to cite or discuss *Schneider* in your brief, I would be happy to discuss the case in greater detail. The *Schneider* opinion is confusing, misleading and selectively omits material facts; for example, it fails to mention that multiple notices were sent to the registered vehicle owners warning that their vehicles would be destroyed. The opinion in your case describes *Schneider* as standing for the rule that "notice citing incorrect statute number violated due process," which was not the issue at all.

Your case is important. As in my *Schneider* case, an expansive interpretation of procedural due process notice is being used to unreasonably expand governmental liability. Please call on me if I can be of assistance.

Very truly yours,

JOHN J. SANSONE, County Counsel

By /s/ Morris G. Hill
MORRIS G. HILL, Deputy

MGH:lc
Encl.

APPENDIX B

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